FILE COPY

Office - Supreme Court
FILED
SEP 18 19
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1947

No. 303

CLARENCE L. MYERS and OTTO L. MYERS, Executors of the Will of CARRIE GUGGENHEIM, deceased,
Petitioners,

vs.

NEW YORK STATE TAX COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MORTIMER M. KASSELL,
Counsel for Respondent.

FRANCIS KELLIHER,
With him on this brief.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX

PAGE

Summary statement of the case..... 1

POINT I—Petitioners seeks to raise in this Court questions not presented to or passed upon by the New York Court of Appeals..... 2

POINT II—The questions which petitioners now seek to raise are either not of substance or have heretofore been determined by this Court.. 4

Conclusion 9

TABLE OF CASES CITED.

Clarke v. McDade, 165 U. S. 168..... 4

Colgate v. Harvey, 296 U. S. 404..... 5

Frick v. Pennsylvania, 268 U. S. 473..... 7

Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412 8

Harding, Matter of, 279 N. Y. 142..... 8

Knowlton v. Moore, 178 U. S. 41..... 6

Lagergren, Matter of, 276 N. Y. 184..... 8

Lawrence v. State Tax Commission 286 U. S. 276..... 6

Madden v. Kentucky, 309 U. S. 83..... 5

Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283 6

Marvin v. Trout, 199 U. S. 212..... 4

Maxwell v. Bugbee, 250 U. S. 525..... 7, 8

Northwestern Bell Telephone Co. v. Nebraska State Railway Commission, 297 U. S. 471..... 4

Saltonstall v. Saltonstall, 276 U. S. 260..... 4

Silver v. Silver, 280 U. S. 117..... 4

Wisconsin v. J. C. Penney Co., 311 U. S. 435..... 8

II.

Table of Statutes Cited.

	PAGE
Constitution of United States, Fourteenth Amendment	4, 6
Internal Revenue Code, section 813(b)	2
Judicial Code, section 237 (b)	2
Tax Law, section 249-n	1, 2, 3, 5, 6, 8
Tax Law, section 249-p	5
Tax Law, section 249-r	6
Tax Law, section 249-s	6

IN THE

Supreme Court of the United States

October Term, 1947

No. 303

CLARENCE L. MYERS and OTTO L. MYERS, Executors of the Will of CARRIE GUGGENHEIM, deceased,
Petitioners,

vs.

NEW YORK STATE TAX COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary Statement of the Case

There is no dispute as to the facts in the present case, and the statement of facts contained in the petition for certiorari is not challenged by respondent. However, petitioners' statement so emphasizes details that the broad question is not entirely clear.

This case arose under section 249-n of the Tax Law of the State of New York, which imposes an estate tax measured by the credit allowable against the Federal estate tax

(section 813(b), Internal Revenue Code). The amount of such credit is dependent upon the value of all of decedent's property, wherever situated. Under section 249-n, if all property transferred by a decedent is subject to the taxing jurisdiction of New York, the New York tax so imposed is equal to 100% of the Federal credit. However, if some of such property is not subject to tax by New York, the statute commands that "proper reduction of the amount of such tax shall be made". In such a case, the plan of the statute is to allocate to New York the share of the Federal credit attributable to decedent's New York property.

In the State courts there was argued and decided the proper construction of this statute. Decedent's property subject to tax by the State of New York constituted 63.8475% of all property transferred by decedent. (R. 5.) Accordingly, the order of the Court of Appeals determined, contrary to petitioners' claim, that the New York tax imposed on the transfer of this decedent's New York property by section 249-n of the Tax Law was 63.8475% of the amount of credit allowable against the Federal estate tax.

POINT I

Petitioners seek to raise in this Court questions not presented to or passed upon by the New York Court of Appeals.

The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code, which authorizes review by certiorari of "any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the

ground of its being repugnant to the Constitution, treaties, or laws of the United States * * *."

The record in the present case wholly fails to show that in the Court of Appeals the validity of section 249-n of the Tax Law was challenged upon any ground under the Constitution of the United States. Much less does it disclose that the particular questions which petitioners seek to raise in this Court were presented to or passed upon by the Court of Appeals.

In their application to the Surrogates' Court, petitioners' only claim with respect to any constitutional infirmity in section 249-n of the Tax Law was "that any construction of the law which would authorize further or additional taxes in the present case would be unconstitutional." (R. 6.) The order of the Surrogates' Court made upon such application, recites that the attorneys for petitioners had "contended that the statute in question should not be construed to require the payment of any further tax and that to so construe it would render it in violation of the Constitution of the United States and of the Fourteenth Amendment thereto * * *." (R. 3.) In his opinion, the Surrogate said that application of the formula set forth in section 249-n of the Tax Law "invades no constitutional rights." (R. 9.) This is the full extent of the record disclosure as to what question or questions under the Constitution of the United States were presented to and passed upon by the Surrogates' Court.

There is nothing to indicate that any constitutional question was considered either by the Appellate Division or the Court of Appeals, no opinion having been written by either court. The notices of appeal to said courts (R. 2 and 10-11), and order of affirmance by the Appellate Division (R. 12) and the remittitur of the Court of Appeals (R. 14-15) are

entirely devoid of any indication as to what question or questions, if any, under the Constitution of the United States were presented to or passed upon by them.

Even if it be assumed that petitioners made the same contention in the Court of Appeals as they did in the Surrogates' Court, it should be noted this Court has more than once held that a vague and general assertion of repugnancy to the Fourteenth Amendment is insufficient to raise a Federal question.

Clarke v. *McDade,* 165 U. S. 168;
Marvin v. *Trout,* 199 U. S. 212.

It is likewise well settled by the decisions of this Court that it will review only the specific questions arising under the Constitution of the United States which have been considered and passed upon by the State court whose judgment is sought to be reviewed.

Saltonstall v. *Saltonstall,* 276 U. S. 260;
Silver v. *Silver,* 280 U. S. 117;
Northwestern Bell Telephone Co. v. *Nebraska State Railway Commission,* 297 U. S. 471.

Accordingly, the questions which petitioners now seek to present for determination by this Court not having been properly raised in the Court of Appeals, the petition for certiorari should be denied.

POINT II

The questions which petitioners now seek to raise are either not of substance or have heretofore been determined by this Court.

The petition for certiorari states three questions for determination by this Court. The first of these is whether

section 249-n of the Tax Law of the State of New York abridges the privileges or immunities of citizens of the United States. It is asserted that such an abridgement exists because said section imposes on New York residents an estate tax measured by the credit allowable against the Federal estate tax, while no such tax is imposed with respect to nonresident estates.

Here petitioners have proceeded upon a false premise. As to both resident and nonresident estates, the amount of the Federal credit is one of the bases of measuring the New York tax. Section 249-p of the Tax Law imposes the New York estate tax on nonresidents. It provides that the tax on the transfer of the nonresident's New York property shall be a fraction of what would be payable if the decedent had died a resident of New York. The first step in computing such nonresident tax is to "ascertain the amount of tax which would be payable * * * if the decedent had died a resident of this state." The resident tax is dependent on the amount of the credit allowable against the Federal estate tax. Hence, the nonresident tax also is dependent on the amount of such credit.

Furthermore, with respect to a controversy between a state and one of its own citizens, it is well established that the privileges and immunities protected by the Fourteenth Amendment are only those arising out of national citizenship, not those created or granted by the state itself.

> *Madden* v. *Kentucky*, 309 U. S. 83 (overruling *Colgate* v. *Harvey*, 296 U. S. 404, relied upon by petitioners).

The privilege of transmitting property at death is not one arising from national citizenship; instead, it is one subject to and derived from the power of the state exclusively.

(*Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283; *Knowlton* v. *Moore*, 178 U. S. 41).

Nothing in the Fourteenth Amendment prevents a state from taxing estates of resident decedents on any reasonable basis, regardless of the basis employed for taxing nonresidents. (*Lawrence* v. *State Tax Commission*, 286 U. S. 276.)

Respondent submits therefore that the first question stated in the petition for certiorari is not a question of substance.

The second and third questions stated in the petition for certiorari are so interrelated that they may conveniently be discussed together. In substance, petitioners assert that questions exist as to whether a state may impose an estate tax, with respect to the transfer of property subject to its jurisdiction, equal to a proportionate part of what the tax would be if all of decedent's property were subject to the taxing jurisdiction of such state. They assert that the "equal protection" clause and the "privileges and immunities" clause of the Fourteenth Amendment prevent the imposition of a tax so computed.

It should be noted that section 249-n of the Tax Law does not, either in terms or in effect, impose any tax on the transfer of tangible property in another state. It provides that the tax is imposed "upon the transfer of the net estate of every person who at the time of death was a resident of this state." By the terms of sections 249-r and 249-s real property and tangible personal property situated outside the State of New York are specifically excluded in determining the "net estate." The effect of the statute, therefore, is to impose a tax only on the transfer of property subject to the jurisdiction of New York but at a rate determined by considering all of decedent's property wherever situated.

Contentions identical with those made here by petitioners were disposed of by this Court in *Maxwell v. Bugbee*, 250 U. S. 525. This Court said (at page 539):

> "It is not to be disputed that, consistently with the Federal Constitution, a State may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed. * * * In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. * * *"

In *Frick* v. *Pennsylvania*, 268 U. S. 473, at pages 495-6, this Court described the statute which it had previously considered in *Maxwell* v. *Bugbee, supra*, in the following language:

> The state statute, described according to its essence, provided for a tax graduated in rate according to the value of the entire estate, and required that where the estate was partly within and partly without the State the transfer of the part within should bear a proportionate part of what according to the graduated rate would be the tax on the whole."

This is exactly the effect of the New York estate tax measured by the Federal credit; the part of decedent's estate within the State of New York bears merely a proportionate part of what would be the tax on the whole estate if the whole were subject to the jurisdiction of New York.

The principle of *Maxwell* v. *Bugbee* has been consistently approved by this Court.

Great Atlantic & Pacific Tea Co. v. *Grosjean*, 301 U. S. 412;

Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435.

Petitioners assert that a "hostile discrimination" results because the values of "gross assets" are used in computing the tax under section 249-n of the Tax Law. However, no indication is given as to who or what receives hostile or discriminatory treatment by virtue of such computation.

Contrary to such assertion, this Court has approved the use of "gross assets" in a statute designed to accomplish the same purpose as section 249-n. *(Maxwell* v. *Bugbee, supra.)*

In any event the effect of using "gross assets" is merely to prorate all deductions against all property transferred by decedent whether subject to the taxing jurisdiction of the state or otherwise. (Cf. *Matter of Lagergren*, 276 N. Y. 184; *Matter of Harding*, 279 N. Y. 142.) The use of "net estate" values, apparently suggested by petitioners, would produce hopeless confusion and a distorted result, because some deductions would be taken into consideration two or more times (once by each taxing jurisdiction), while as to others the contrary would be true. As an example, the use of "net estate" values in the present case would have resulted in a higher New York tax than the one here questioned, for the New York net estate ($341,178.38—R. 5) is more than 77% of the Federal net estate ($442,778.22—R. 7).

Respondent submits that the second and third questions presented by the petition have heretofore been answered by this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

MORTIMER M. KASSELL,
Counsel for Respondent,
State Office Bldg.,
Albany, N. Y.

FRANCIS KELLIHER,
With him on this brief.